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Case No. 88-5986

In The Supreme Court of the United States

October Term, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF AMICI CURIAE, THE ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, MASSACHUSETTS, MICHIGAN, MISSOURI, NEVADA, OHIO, SOUTH DAKOTA AND WASHINGTON

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QUESTIONS PRESENTED

I. Do the First Amendment to the United States Constitution and *Stanley* v. *Georgia*, 394 U.S. 557 (1969), guarantee to citizens the fundamental right and liberty to privately possess child pornography?

II. May a state prohibit private possession of child pornography consistent with the First Amendment where the material is a visual depiction of a nude minor child that involves a lewd exhibition or graphic focus on the genitals?

III. May a State Supreme Court consistent with due process authoritatively construe a statute prohibiting possession of child pornography and affirm a conviction under that construction where the legislative intent of the statutory scheme is clear and the narrowing construction is foreseeable?

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.5 of the Rules of the Supreme Court of the United States, the attorneys general of the states identified above submit this brief as *amici curiae* in support of the position espoused by Appellee. The case at bar presents a challenge to the constitutionality of a portion of a statutory scheme promulgated to further a state's compelling interest in protecting its young people from sexual exploitation and violence. Each of the states represented

by amici have in effect legislation prohibiting the possession[1] of or otherwise regulating child pornography. This Court's decision, therefore, is of great interest to the amici because it will bear on the lawfulness of existing and future legislation in this area of the law.

STATEMENT

1. In 1985, United States postal inspectors began an investigation into a Florida business regarding its use of the mails to transmit child pornography (Jt. App. 3). During the investigation, postal inspectors corresponded with Jack S. Smith, a principal in the Florida business. Smith disclosed in one letter that he had an extensive collection of child pornography, including over 1,000 negatives, and that the negatives were in the possession of a friend in Columbus, Ohio. Later, federal authorities executed a search warrant on the premises of Smith and Daniel S. Knous and pursuant to the warrant seized thousands of photographs depicting minors engaging in sexual conduct. Smith and Knous were arrested on federal charges (Jt. App. 3-5).

After his arrest, Smith told postal inspectors that photographic negatives depicting child pornography were in the possession of a friend, Clyde Osborne of Columbus, Ohio. The same information was conveyed to postal authorities by Knous. One mailing list seized during the execution of the search warrant contained the name of Clyde Osborne of Columbus, Ohio (Jt. App. 5-6).

The information concerning Osborne was conveyed by the postal authorities to the Columbus police. A warrant to search the premises of the Osborne residence was applied for and received. During the search, Columbus police found

[1] Nineteen states have banned the possession of child pornography. *See*, listing at A-6. In addition to the Supreme Court of Ohio, two other state supreme courts have expressly found that such statutes are constitutional. *Id.*

and seized four color photographs of a nude young male posing in a lewd manner with a graphic focus on his genitals (Jt. App. 8-10, 20-21, 29, 33). The back of one of the photographs was marked with the notation "Tommy-13" (Jt. App. 9, 11, 19). At a police interview after his arrest, Osborne stated that the subject of the photographs was fourteen years of age when the photography was taken (Jt. App. 14).

2. Osborne was charged by criminal complaint in the Franklin County, Ohio, Municipal Court with a violation of Ohio Revised Code Ann. 2907.323(A)(3) (Page's 1987) (hereinafter "Ohio Rev. Code" or "O.R.C.")(A-4), in that he possessed child pornography as described above (Jt. App. 7). A violation of Ohio Rev. Code 2907.323(A)(3) constitutes a first degree misdemeanor. O.R.C. 2907.323(B)(A-5). After pleading not guilty, Osborne received a trial by jury. The jury found Osborne guilty of the offense charged (Jt. App. 23).

3. The Ohio Court of Appeals affirmed Osborne's conviction (Jt. App. 35). On appeal from the Court of Appeals decision, the Supreme Court of Ohio, in a consolidated case reported under the name *Ohio v. Young*, 37 Ohio St. 3d 249, 525 N.E. 2d 1363 (1988), affirmed Osborne's conviction. The Ohio Supreme Court rejected Osborne's constitutional challenges to O.R.C. 2907.323(A)(3). Following its prior holding in *Ohio v. Meadows*, 28 Ohio St. 3d 43, 503 N.E. 2d 697 (1986), *cert. denied* 107 S. Ct. 1581 (1987), in which it found that Ohio's compelling interest in protecting children from the dangers arising from the possession of child pornography prohibited in O.R.C. 2907.322 (A-3) overrode any countervailing interest in possessing such materials, the court held that possession of the materials specified in O.R.C. 2907.323(A)(3) could be prohibited consistent with the First Amendment. The court authoritatively construed O.R.C. 2907.323(A)(3) and found that the statute was not overbroad because, when fairly construed, it banned possession only of depictions which constitute child pornography, specifically those materials which depict a minor in a state of nudity where such nudity involved a lewd exhibition or graphic focus on the genitals. The court also determined that the term

"minor" contained in O.R.C. 2907.323(A)(3) meant a person under the age of 18 and that pursuant to O.R.C. 2901.21(B), the degree of culpability required was that of recklessness. Thus, it concluded that the statute complied with the guidelines established in *New York v. Ferber*, 458 U.S. 747 (1982), for constitutionally permissible regulation of child pornography. Reviewing the evidence, the Ohio Supreme Court held that Osborne was properly convicted of a violation of O.R.C. 2907.323(A)(3).

4. Osborne filed a motion for rehearing which the Ohio Supreme Court denied, *see* 38 Ohio St. 3d 718, 533 N.E. 2d 788 (1988). He then appealed to this Court. Probable jurisdiction in part was noted on June 26, 1988. The additional questions presented by Osborne were dismissed for lack of jurisdiction and certiorari was denied 492 U.S. ____, 106 S. Ct 563.

SUMMARY OF ARGUMENT

Child pornography constitutes a threat to the physical and psychological well-being of children, *New York v. Ferber*, 458 U.S. 747 (1982), and is beyond the pale of First Amendment protection discussed in *Stanley v. Georgia*, 394 U.S. 557 (1969). Thus, the state may prohibit the possession of such materials without infringing on the First Amendment rights of the possessor.

Even if this court determines that the possession of child pornography is protected activity, the state's compelling interest in the safeguarding of children would override the right to possess such materials. The possession of child pornography adversely affects children because, among other things, it reduces to a recording pornography that might haunt the child in the future, violates the child's privacy interest, and is used by pedophiles to further the sexual abuse of children by enticing them to participate in sexual activity. This is so irrespective of whether child pornography flows in and out of commerce. Given the relatively insubstantial First Amendment value of the possession of child pornography, the state's compelling interest in prohibiting

child pornography renders constitutionally permissible statutes such as O.R.C. 2907.323(A)(3).

Consistent with *Ferber*, child pornography includes not only depictions of children engaged in physical contact of a sexual nature but depictions of children in a state of nudity involving a lewd exhibition or a graphic display of the genitals. The latter results in harm to children every bit as devastating as does the former.

Ohio Revised Code 2907.323(A)(3), which prohibits possession of depictions of children in a state of nudity involving a lewd exhibition or a graphic display of the genitals, is not overbroad. Its reach is limited to activities which do not enjoy First Amendment protection and Appellant has failed to demonstrate that there is a probability that O.R.C. 2907.323(A)(3) as authoritatively construed by the Ohio Supreme Court will reach a substantial number of impermissible applications. Therefore, substantial overbreadth requiring invalidation of the statute is not present.

Ohio Revised Code 2907.323(A)(3) is narrowly tailored to further the state's compelling interest—the protection of children from the ravages of child pornography. As authoritatively construed, the statute carefully avoids infringing on the possession of depictions which might be protected by the First Amendment and instead applies only to unprotected materials.

Finally, because O.R.C. 2907.323(A)(3), as authoritatively construed by the Supreme Court of Ohio, is constitutional, Appellant pins his hopes for reversal on the assertion that the lower court's construction of O.R.C. 2907.323(A)(3) represents a "rewriting" of the statute that deprived him of fair notice of the nature of proscribed conduct. The court below, however, reasonably interpreted Ohio's statute, as written by the Ohio General Assembly, when it held that 1) the term "minor" meant a person younger than the age of eighteen; 2) identified "recklessness" as the appropriate degree of scienter; and 3) equated the term "nudity" with

"lewd exhibition" or "involved a graphic focus on the genitals."

ARGUMENT

I. THE STATE OF OHIO MAY, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, PROHIBIT THE PRIVATE POSSESSION OF CHILD PORNOGRAPHY.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court found that a Georgia statute making criminal the private possession of obscene material impermissibly infringed on the right to receive information and the right to privacy guaranteed by the First and Fourteenth Amendments. Thus, the Court held that a statute regulating obscenity may not reach into a person's home. It noted that its opinion did not infringe on the power of the State to criminalize the possession of other items which had no First Amendment component such as narcotics or criminal tools. *Id.*, at 568 n. 11. Subsequently in *New York v. Ferber*, 458 U.S. 747 (1982), the Court hold that child pornography was so deleterious to the psychological and physical weltare of children that it was beyond the pale of First Amendment protection. As this brief will demonstrate, the harm to children discussed by the Court in *Ferber* is no less when child pornography is possessed than when it is produced or distributed. Moreover, there is evidence that child pornography possessed by pedophiles is used to entice or conditon a child to participate in sexual activity. It is a tool to ease the commission of sexual abuse against children. *Potuto, Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky L. J. 15, 44-45, (1987) ("*Potuto*"). Thus, the possession of child pornography is analogous to the possession of criminal tools discussed in *Stanley* and is entitled to no more constitutional protection.

Even if it were held that Appellant has a First Amendment interest in possessing child pornography, Ohio still may prohibit such conduct. In *Stanley*, the Court expressly

refrained from expressing an opinion on the validity of other statutes making criminal the otherwise lawful possession of printed, filmed or recorded material, such as that affecting national security. But the Court observed that in such cases "compelling reasons may exist for overriding the right of the individual to possess those materials." *Id.* at 568 n.11.

That a state has a compelling interest in the regulation of child pornography, even that which is not obscene, was confirmed in *Ferber*. At the outset of its opinion, the Court recognized that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." 488 U.S. at 749. Although the statute at issue in that case, one which prohibited the distribution of material depicting sexual performance by minors, ran "the risk of suppressing protected expression," 458 U.S. at 756, the Court was "persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* This conclusion was based first on undisputed fact that the state interest in safeguarding the physical and psychological well-being of its children was *compelling*. The Court declined to second guess New York's legislative judgment in determining that child pornography was directly related to the sexual abuse and exploitation of children. Indeed, the Court's independent review of relevant literature confirmed the accuracy of the proposition that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." 458 U.S. 758 n. 9. In contrast to the state's interest, the Court found that it was "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important part of a literary performance or scientific or educational works." 458 U.S. at 763.

The state's compelling interest in the well-being of its minor citizens is significantly advanced when it prohibits the possession of child pornography. For it is clear that possession itself results in great harm to children. Such material continues to exploit and victimize children. *Ferber*, 458 U.S. at 760 n. 10 ("Because the child's actions are

reduced to a recording the pornography may haunt him in future years, long after the original misdeed took place.") (Citation omitted.) Children have a privacy interest in having photographs shielded from the view of others. *Id.* And child pornography is often used to facilitate further sexual abuse of children through enticement of children to participate in sexual activity. *Potuto*, citing *Attorney General's Commission On Pornography, Final Report* (July, 1988);[2] *Note, Protection of Children From Use In Pornography: Toward Constitutional And Enforceable Legislation*, 12 U. Mich. Law Reform 295, 300-301 (". . . child pornography appears to play a special role in the molestation of children"). The same overriding state interest which led the Court to uphold the New York statute in *Ferber* animates the Ohio statutes making possession of child pornography a crime.

Appellant asserts that the State's interest is limited to regulating the production and sale of child pornography, so as to protect children from the harm of being posed in sexual conduct and having photographs circulate in commerce. Appellant's Brief at 31. Of course, amici concur with Appellant that a state has a compelling interest in regulating the circulation of child pornography. Appellant ignores, however, the disturbing fact that the underground child pornography market includes the private, non-commercial production and exchange of child pornography. H.R. Rep. No. 536, 98th Congress, 1 Sess. 2, 11 (1983), cited in *Potuto* at 44 n.124.[3] Consequently, the state's compelling interest in controlling child pornography necessarily extends beyond the mere regulation of commerce. Indeed, the state's interest in prohibiting the possession of child pornography is every bit as compelling as its interest in prohibiting its

[2] "Apparently, virtually all child sexual abusers possess child pornography." *Potuto*, at 26.

[3] Thus, in enacting the Child Protection Act of 1984, Congress deleted the "for commercial purpose element" of the offense of transmitting or receiving child pornography through the mail. 18 U.S.C. §2252(a). *Note, Behind Closed Doors - The Clandestine Problem of Child Pornography*, 21 Creighton L. J. 917, 924 (1986). ("Behind Closed Doors").

commercialization. *See Potuto*, at 51 ("An at-home possessor seems more likely than a commercial distributor to use pornography in ways, such as enticing children to sexual activity, that involve the intertwined child pornography enterprise.")

Unlike *Stanley*, where the harm of possession of obscenity posited by the State—harm to the possessor himself—was considered by the Court to be insubstantial or based upon mere speculation, the harm involved in the possession of child pornography—the sexual exploitation and abuse of children—is real and involves a governmental concern of surpassing importance. As such, it is a compelling reason "for overriding the right of the individual to possess those materials" which might otherwise be protected under *Stanley*.

II. THE PRINCIPLES ESTABLISHED IN *NEW YORK V. FERBER* PERMIT A STATE TO PROHIBIT POSSESSION OF DEPICTIONS OF CHILD NUDITY, WHERE SUCH NUDITY INVOLVES A LEWD EXHIBITION OR A GRAPHIC FOCUS ON THE GENITALS.

In *New York v. Ferber, supra*, the Court established the contours of a constitutionally valid statute regulating child pornography. Of primary importance to this case, the conduct prohibited must be adequately defined by the applicable statute, as written or authoritatively construed. See, *Ferber*, 458 U.S. at 764. The category of conduct proscribed in the case of the New York statute—sexual conduct—had to be suitably limited and described.[4] Although *Ferber* made clear that 'nudity without more is protected expression. . .," 458 U.S. at 765 n. 18, the Ohio statute does involve "more." A review of the Ohio statutory scheme of which O.R.C. 2907.323(A)(3) is a part and the authoritative construction

[4] The Court also required that a statute regulating this area specify the age of minority, 458 U.S. at 764, and contain an element of scienter, 458 U.S. at 765. As noted in Part III, O.R.C. 2907.323 as fairly and authoritatively construed contains each of these elements.

of O.R.C. 2907.323(A)(3) by the Ohio Supreme Court reveals that the proscription contained therein comports with the requirements of the First Amendment as considered in *Ferber*.

A. Ohio Revised Code 2907.323(A)(3) Prohibits The Possession Of Child Pornography.

The Ohio statutory scheme regulating child pornography is a continuum involving three separate sections. The first, O.R.C. 2907.321, (A-2), prohibits pandering obscenity involving a minor. Among its proscriptions is the production, exhibition, advertising, presentation, or possession of obscene material involving a minor. The second provision, O.R.C. 2907.322, prohibits among other things the production, exhibition, advertising, presentation or possession of material which depicts a minor participating or engaging in "sexual activity,"[5] masturbation, or bestiality. The third and last statute in the continuum is O.R.C. 2907.323 which in subsection (A)(3) prohibits the possession or viewing of material depicting a minor who is in a state of nudity[6] where such nudity consists of a lewd exhibition or involves a graphic

[5] "Sexual activity" for the purposes of O.R.C. 2907.322 is defined in O.R.C. 2907.01(C) as "sexual conduct or sexual contact, or both." In turn, O.R.C. 2907.01(A) defines "sexual conduct" as ". . . vaginal intercourse between a male and a female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." (A-1.) O.R.C. 2907.01(B) defines "sexual contact" as ". . . any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttocks, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." (A-1.)

[6] "Nudity" is defined in O.R.C. 2907.01(H) as ". . .the showing, representation or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state." (A-2.)

focus on the genitals" (Jt. App. 42).

Thus, it is clear that Ohio is not trying to proscribe "mere nudity." Rather, through O.R.C. 2907.323(A)(3), it is, as held by the Ohio Supreme Court, outlawing only conduct which is not morally innocent—i.e. possession of depictions which constitute child pornography.

The materials the possession of which Ohio forbids through O.R.C. 2907.323(A)(3) do not, as Appellant repeatedly asserts, fall outside the permissible boundaries of state regulation described in *Ferber*. Appellant reads *Ferber* as standing for the propostion that child pornography consists only of those materials which would depict what is defined under Ohio law as "sexual activity," *see* n. 4, *supra*, that is, depictions of actual physical contact of a sexual nature. Appellant's Brief at 35. It is true that *Ferber* spoke of child pornography in the context of sexual conduct. It did so because that was the issue with which it was presented. More importantly, the definition of "sexual conduct" contained in the New York statute approved in *Ferber* included not only matters involving actual physical touching or contact of a sexual nature but "lewd exhibition of the genitals." 458 U.S. at 765. Thus, the requirement of sexual conduct as used by the Court in *Ferber* is broad enough to encompass the material proscribed by O.R.C. 2907.323. This is an eminently sensible reading, for child pornography "[a]t the very least involves the posing of a child in a

[7] Appellant complains that the terms "lewd" and "graphic" do not adequately describe that which Ohio is attempting to prohibit, or at least do not detract from his claim that O.R.C. 2907.323(A)(3) prohibits possession of mere nudity. Appellant's brief at 32-33. Such is not the case. The term "lewd" has been used by the federal government in its child pornography statute. *United States v. Nemuras*, 567 F.Supp. 87 (D. Md. 1983 ("lewd" has generally well-recognized meaning connoting sexual suggestiveness). And the term "graphic" has likewise been used to describe sexually oriented material not protected by the First Amendment. *See, e.g., United States v. Various Articles of Merchandise*, 600 F.Supp. 1383, 1387 (1985) (describing seized publications as containing photographs with "graphic display of genitalia.").

suggestive fashion and in circumstances likely to cause nervousness, shame, and anxiety." *Potuto* at 40; and see *Behind Closed Doors, supra,* at 917 ("Child pornography is a form of sexual abuse which shows children as young as three years of age engaged in such activities as *lewd poses,* masturbation, intercourse, fellatio, cunnilingus, rape, incest and sadomasochism") (citations omitted, emphasis added).

Appellant's assertion that the State has a compelling interest in regulating only material which (1) depicts minors engaging in sexual conduct which involves physical contact or touching and (2) is commercially distributed is erroneous. There is ample authority from which to conclude that sexually suggestive photographs of children harm those children in a demonstrable fashion. A child may suffer embarrassment or shame in posing nude in a seductive manner. *Potuto* at 76. A child who poses or is forced to pose in a sexually explicit manner will be no less haunted in future years by knowledge that a photograph memorializing his conduct is somewhere "out there" than if the photograph were of him engaging in physical contact of a sexual nature.[8] Cf. *Ferber,* 458 U.S. at 759 n. 10. Such a child's privacy is invaded just as much. *Id.* And, unlike adults, children cannot give informed consent to the production, distribution, or possession of sexually explicit and exploitive photographs. *Cf. Bellotti v. Baird,* 443 U.S. 622, 634-637 (1979) (inability of children to make decisions in an "informed, mature manner"). Such

[8] "In a hearing before the Senate Judiciary Committee, for example, one expert was asked: 'How harmful is it for a child to be photographed in a sexually explicit position? What is the long range impact on the psyche or life of that child?' Her response was: 'It is not just the photograph but it is what happens afterward, where all of the photos go. And there [sic] always are sexually molested, debased, raped, whatever, that is all part of the whole scene.'" Question by Sen. Arlen Spector (Pa.) and answer by Ann Burgess, Prof. Psychiatric Nursing, Univ. Pa., recounted in *Potuto* at 39 (citation omitted).

poses are child abuse.[9] *Behind Closed Doors, supra,* at 917. In sum, the children involved in sexually suggestive photographs are likely to suffer profound emotional and physical damage.

Although the focus of the court in *Ferber* was on commercial distribution of child pornography, that being the evil that the New York statute proscribed, it cannot be doubted that even child pornography outside the stream of commerce has effects which the State justifiably may seek to eradicate through the criminalization of such material. As noted in Part I, the harmful effects of possession exist whether or not the possessor obtained the illicit material through commerce or otherwise. Moreover, private, non-commercial channels of distribution play a large part in the underground pornography market. The way in which Appellant obtained the four pictures of a nude male child in sexually suggestive poses illustrates the point.

Thus, the State has a compelling interest in prohibiting the possession of depictions of nude children in sexually suggestive poses. Because O.R.C. 2907.323(A)(3) regulates child pornography only, it is consistent with *Ferber* and passes constitutional muster.

B. Ohio Revised Code 2907.323(A)(3) Is Not Overbroad.

"The First Amendment doctrine of overbreadth is an

[9] The fact that physical contact of a sexual nature is not portrayed in the depiction does not mean that such conduct has not occurred during the production of the depiction. "Most of [the] harm [to the child] results from sexual molestation from adults, whether it is recorded on film or not. Even if the child is photographed alone or with other children in simulated acts, the producers of the visual material often engage in sexual activity with the child before and after photographing. Thus, the absence of adults in the visual material does not mean that the child has not been sexually assaulted by an adult." *Note, Protection of Children From Use In Pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich J.L. Ref. 295, 300 and nn. 35-36 (1979).

exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the basis that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, ___ U.S. ___, 109 S. Ct. 2633, 2637 (1989) (citations omitted). The doctrine is based on the premise that an overly broad statute may chill others from exercising their right of expression guaranteed under the First Amendment. *Id.* Because application of the overbreadth principle may result in the striking down of a statute at the instance of one whose conduct may be punished despite the First Amendment, the Court has carefully limited its scope. The overbreadth doctrine, therefore, has been characterized as strong medicine and "employed . . . with hesitation, and then 'only as a last resort.' " *Ferber*, 458 U.S. at 769, quoting from *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Particularly where conduct and not speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770.

Ohio Rev. Code 2907.323(A)(3) regulates conduct, not pure speech, and any overbreadth attack must be evaluated in light of the test established in *Broadrick* and applied to child pornography in *Ferber*. Appellant's claim of overbreadth is predicated on the notion that because O.R.C. 2907.323(A)(3) does not regulate materials depicting sexual conduct which are placed into the stream of commerce, it does not regulate child pornography but rather material protected by the First Amendment.

Appellant's assertions are incorrect. As demonstrated earlier, O.R.C. 2907.323(A)(3) as authoritatively construed by the Ohio Supreme Court prohibits possession of materials which fall within the scope of the term "sexual conduct" as used by the Court in *Ferber* and the New York child pornography statute at issue. Moreover, it is clear that child pornography distributed outside the stream of commerce has harmful effects on children which are no less worthy of the State's attention than child pornography conveyed within the stream of commerce. In sum, the State of Ohio through O.R.C.

2907.323(A)(3) has prohibited child pornography, a category of material left unprotected by the First Amendment whether or not it is distributed in commerce.

In any event, the material prohibited by O.R.C. 2907.323(A)(3) and possessed by Appellant is unprotected child pornography. Because Appellant has failed to demonstrate that there is a probability that the statute would reach a substantial number of impermissible applications, *Ferber*, 458 U.S. at 771, substantial overbreadth which would invalidate the statute is not present.

C. Ohio Rev. Code 2907.323(A)(3) Is Narrowly Tailored To Meet The Compelling State Interest In Preventing The Harmful Effects To Children Related To The Possession Of Child Pornography.

Appellant argues that O.R.C. 2907.323(A)(3) is not narrowly tailored to serve the compelling state interest of safeguarding its children on the basis that O.R.C. 2907.323(A)(3) does not protect children from sexual abuse. This is so, Appellant claims, because O.R.C. 2907.323(A)(3) does not, as do O.R.C. 2907.321 and O.R.C. 2907.322, regulate materials that depict children either in an obscene way or engaging in masturbation, bestiality, or physical contact of a sexual nature. But Appellant ignores the authority cited in Part I which details the sexual abuse and harm that are attendant in the production of sexually provocative depictions of physical contact of a sexual nature. Moreover, Appellant completely ignores the very real harm to children caused by possession of the type of child pornography prohibited by O.R.C. 2907.323(A)(3). In light of these facts, it cannot be denied that O.R.C. 2907.323(A)(3) is narrowly tailored to protect children from the harm of possession of child pornography. There is, quite simply, no other way to do it.

Nor does the fact that Ohio chose to place within O.R.C. 2907.323 certain exemptions detract from its validity. First, the exemptions serve to limit the scope of the statute to the regulation of a variety of child pornography. *Ohio v. Young*,

37 Ohio St. at 251-252 (Jt. App. 42). The exemptions confirm that protected conduct is outside the scope of the statute. Although it is clear from *Ferber* that an overbreadth attack on O.R.C. 2907.323(A)(3) would not succeed even in the absence of the exemptions, Ohio has chosen to make clear that it has not proscribed possession for proper reasons such as medical or education uses. See *Ferber*, 458 U.S. at 766-67 (New York Court of Appeals found statute overbroad because it might prohibit the sale or use of the proscribed material for medical or educational reasons); *see also* concurrence of Justice Brennan, 458 U.S. at 776. ("The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not "de minimus.' "). Similarly, the parental exception of O.R.C. 2907.323(A)(3)(b) serves to exclude from the law the idea that it would "make a criminal out of a parent who takes a full frontal view picture of his or her naked one-year old running on a beach or romping in a wading pool." *Massachusetts v. Oakes* 109 S. Ct. at 2637 (citing *Commonwealth v. Oakes*, 401 Mass. 602, 518 N.E. 2d 836, 838 (1988)); *see also* dissenting opinion of Justice Brennan 458 U.S. at 2643. These exemptions are evidence of legislative sensitivity to the First Amendment.

Petitioner was convicted of engaging in conduct, possession of child pornography, which was not protected by the First Amendment. The statute under which he was convicted was narrowly drawn to advance Ohio's compelling interest in protecting its children. Thus, it withstands constitutional scrutiny.

III. THE OHIO SUPREME COURT'S CONSTRUCTION OF OHIO REVISED CODE 2907.323(A)(3) IS CONSISTENT WITH THE SECTION'S LANGUAGE AND IS NOT THE EQUIVALENT OF AN EX POST FACTO LAW AS APPLIED TO APPELLANT.

It is settled law that "child pornography . . . is unprotected speech subject to content-based regulation." *Ferber*, 458 U.S. 747, 765 n.18. As previously discussed, Ohio's statute,

as "authoritatively construed", *see Ferber*, 458 U.S. at 764, comfortably satisfies the test established for determining the constitutionality of child pornography legislation.

Appellant's last resort, therefore, is to characterize as "ex post facto" in nature the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3), as applied to him. Appellant argues that the "version" of O.R.C. 2907.323(A)(3) under which he was tried 1) gave him no fair notice of the definition of the term "minor", 2) did not require any showing of scienter, and 3) could not be read as the Ohio Supreme Court did, equating the term "nudity" with "lewd exhibition" or "involves a graphic focus on the genitals." In effect, Appellant argues that O.R.C. 2907.323(A)(3) is void for vagueness. A review of relevant case and statutory law, however, compels a different conclusion than the one drawn by Appellant.

A. The Ohio Supreme Court Correctly Interpreted The Term "Minor" As Someone Younger Than Eighteen Years of Age.

In order to be invalidated on grounds of vagueness, a statute must fail to inform a person of average intelligence of the nature of proscribed activity. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The vagueness doctrine, therefore, is designed to address the issue of whether legislation adequately describes what constitutes illegal conduct. *See Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969) (Blackmun, J.), *cert denied*, 398 U.S. 965 (1970) (statute need not be drafted with "meticulous specificity").

Statutory construction begins with the "fundamental canon . . . that . . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). *Webster's New Collegiate Dictionary* (1979) defines "minor" as "a person who has not attained majority." *Id.* at 727; *see also Black's Law Dictionary* 899 (5th Ed. 1979) ("In most states, a person is no longer a minor after reaching the age of 18."); O.R.C. 3109.01 (defining the age of majority in Ohio as

eighteen). Thus, consistent with the Court's pronouncement in *Perrin*, the omission from O.R.C. 2907.323(A)(3) of a specific statutory definition of "minor" requires that the term be construed, for purposes of O.R.C. 2907.323(A)(3), as taking its common meaning, which is a person under the age of eighteen.[18] This is exactly what Ohio's courts did in the case at bar. This construction of "minor" is both commonsensical, in that it is the likely construction to be given the word by a person of average intelligence, and mandated by the Court's previous holdings.

B. Ohio Revised Code 2907.323(A)(3) Is Governed By A Specific Degree Of Scienter As Required By *Ferber*.

According to the Court's holding in *Ferber*, "criminal responsibility [in respect to child pornography laws] may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. (Citation omitted.) Although it is true that O.R.C. 2907.323(A)(3) makes no reference to the degree of scienter necessary to establish culpability, this does not mean that Ohio Law is silent on the subject. To the contrary, the degree of scienter necessary for purposes of conviction under O.R.C. 2907.323(A)(3) plainly is spelled out in the Ohio Revised Code.

Pursuant to O.R.C. 2901.21:

> [w]hen the section defining an offense . . . neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense. (A-1)

As noted, O.R.C. 2907.323(A)(3) makes no reference to culpability. In addition, it is not "plain" from the language

[18] At trial, Appellant proposed a jury instruction that would have established fifteen as the age of majority for purposes of O.R.C. 2907.323(A)(3). (R.7.) Interestingly, Appellant's uncontradicted testimony was that the young boy photographed was fourteen when his picture was taken. (Jt. App. 16.)

of O.R.C. 2907.323(A)(3) that the Ohio General Assembly intended strict liability to be the standard for conviction. It necessarily follows that "recklessness" is the degree of culpability necessary to justify conviction under Ohio law. Further, "recklessness" is defined under Ohio law in a manner sufficient to satisfy *Ferber's* requirement that some element of scienter be present. *See* O.R.C. 2901.22(C) (reference to recklessness being "the equivalent of a perverse [ ] disregard [ ] [for] a known risk") (A-1). (Emphasis added.)

C. The Ohio Supreme Court Correctly Interpreted The Meaning Of The Term "Nudity" For Purposes Of Ohio Revised Code 2907.323(A)(3).

The final prong of Appellant's "retroactivity" attack on O.R.C. 2907.323(A)(3) is his contention that the Ohio Supreme Court "rewrote" the definition of "nudity" in order to affirm his conviction. A review of the Ohio Supreme Court's analysis of O.R.C. 2907.323(A)(3), however, reveals that the court interpreted nudity for purposes of the Ohio statute in the only reasonable fashion.

The court below began its discussion of the term "nudity" by recognizing in all candor that "[i]t is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state [of] nudity to a lewd exhibition or a graphic focus on the genitals." *Young*, 37 Ohio St. 3d at 251 (Jt. App. 42). Nevertheless, the court correctly pointed out that the scope of "nudity" was significantly narrowed by the "proper purposes" exceptions contained in subparagraphs (a) and (b) of the Ohio statute. *Id.* The court continued its analysis by noting that:

> [t]he clear purpose of these exceptions . . . is to sanction possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is not morally innocent, i.e., the possession or viewing of the

described material for prurient purposes.

Young, 37 Ohio St at 252 (Jt. App. 42). The court correctly concluded that the "proper purposes" exceptions limited the application of O.R.C. 2907.323(A)(3) t[illegible] universe of child pornography. *Id.*

The Ohio Supreme Court's interpretation of the term "nudity", read in the context of O.R.C. 2907.323(A)(3), makes far more sense than does Appellant's reading of the statute as a whole. First, the Ohio statute does not prohibit a parent from possessing a nude photograph of his child. *See* O.R.C. 2907.323(A)(3). Consequently, it does not prohibit possession of a photograph of a "baby on the bearskin rug." Second, the exceptions to the proscriptions contained in O.R.C. 2907.323(A)(3) make it plain that possession for any purpose that falls within the perimeters of expression protected by the First Amendment is not regulated by the Ohio statute. A simple process of elimination results in the conclusion that O.R.C. 2907.323(A)(3) is directed only toward unprotected expression. Rather than rewriting O.R.C. 2907.323(A)(3), the Ohio Supreme Court properly interpreted the statute as written by the Ohio General Assembly.

Historically, this Court has approached vagueness challenges to legislation that regulates unprotected expression and activity in a manner consistent with the following passage from *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 578-79 (1973):

> There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary

> common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Read in this light, Appellant's vagueness challenge to O.R.C. 2907.323(A)(3) must fail."

" In any event, since the Ohio Supreme Court restricted the reach of the possession statute, rather than expanding its scope or making prosecution easier, as in *Miller v. California*, 413 U.S. 15, 24-25 (1973), the rule established in *Marx v. United States* 430 U.S. 188, 194-97 (1977) does not apply. Appellant is not entitled to retrial and this Court can affirm his conviction under the harmless error rule of *Pope v. Illinois*, 481 U.S. ___, 95 L. Ed. 2d 439, 445-47) (1987).

CONCLUSION

The state's interest in protecting children is of such overriding importance that it permits the prohibition of the possession of child pornography, whether or not the possession of such materials otherwise would be protected by the First Amendment. Moreover, depictions of children in a state of nudity which consists of a lewd exhibition or a graphic display of the genitals are child pornography and fall within the permissible reach of state regulation. Ohio Revised Code 2907.323(A)(3), as authoritatively construed by the Ohio Supreme Court, therefore lawfully prohibits the possession of child pornography. Appellant had fair notice of its terms. Accordingly, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX TO BRIEF FOR AMICI
APPENDIX A

OHIO REVISED CODE 2901.21

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2901.22

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to the circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

. . .

(portions omitted)

OHIO REVISED CODE 2907.01

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercoure, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal

intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

. . .

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(portions omitted)

* * *

OHIO REVISED CODE 2907.321

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any obscene material that has a minor as one of its participants or portrayed observers;

(3) Create, direct, or produce an obscene performance that has a minor as one of its participants;

(4) Advertise for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;

(5) Possess or control any obscene material, that has

a minor as one of its participants;

(6) Bring or cause to be brought into this state an obscene material that has a minor as one of its participants.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2907.322

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Exhibit or advertise for sale or dissemination, sell, disseminate, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(5) Possess or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(B) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

. . .

(portions omitted)

* * *

OHIO REVISED CODE 2907.323

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:

(a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian or custodian consents in writing to the photographing of the minor, to the use of the minor in the material and to the specific manner in which the material or performance is to be used.

(2) Consent to the photographing of his minor child or

ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

(B) Whoever violates this section is guilty of illegal use of a minor in a nudity-oriented material or performance. Whoever violates division (A)(1) or (2) of this section is guilty of a felony of the second degree. Whoever violates division (A)(3) of this section is guilty of a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(3) of this section, illegal use of a minor in a nudity-oriented material or performance is a felony of the fourth degree.

APPENDIX B

STATE STATUTES PROHIBITING POSSESSION OF CHILD PORNOGRAPHY

1. MINNESOTA - § 617.247, Minnesota Statutes (1983).

2. ARIZONA - § 13-3553, Arizona Revised Statutes (1983).

3. NEVADA - § 200.730, Nevada Revised Statutes (1983).

4. ALABAMA - § 13A-12-192, Code of Alabama (1984).

   Upheld in *Felton v. State*, 526 So.2d 635 (Ala. Cr. Ap. 1986), *Aff'd*, 526 So.2d 638 (Ala. Sup. Ct. 4-8-88), *reh. denied* 5-20-88.

5. OHIO - § 2907.321, § 2907.322, § 2907.323 Ohio Revised Code (1984).

   § 2907.322 upheld in *State v. Meadows*, 28 Ohio St. 3d, 43 503 N.E.2d 697 (Ohio 1986) *cert. denied* 480 U.S. ——, 94 L.ED.2d 771, 107 S.Ct. 1581, (1987).

6. OKLAHOMA - § 1021.2, Oklahoma Statutes (1984).

7. WASHINGTON - § 9.86A.070, Revised Code of Washington (1984).

8. TEXAS - § 43.26, Texas Penal Code Ann. (1985).

9. FLORIDA - § 827.071, Florida Statutes (1985).

10. UTAH - § 76-5a-3, Utah Code Ann. (1985).

11. ILLINOIS - § 11-20.1, Illinois Revised Statutes (1985).

Upheld in *People v. Geever*, 122 Ill.2d 313, 522 N.E.2d 1200 (Illinois 1988).

12. KANSAS - § 21-3516, Kansas Statutes Ann. (1986).

13. GEORGIA - § 16-12-100, Code of Georgia Ann. (1987).

14. MISSOURI - § 573.037, Missouri Revised Statutes (1987).

15. IDAHO - § 18-1507(3)(b) and §18-1507A, Idaho Code (1987).

16. S. DAKOTA - § 22-22-23.1, South Dakota Codified Laws Ann. (1987).

17. NEBRASKA - § 28.808, Revised Statutes of Nebraska (1988).

18. COLORADO - § 18-6-403, Colorado Revised Statutes (1988).

19. WEST VIRGINIA - § 61-8C-3 and § 61-8D-6, West Virginia Code (1988).